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Office of Administrative Law Judges
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CASE NO. 85-ERA-00002

In the Matter of

VERA M. ENGLISH

v.

GENERAL ELECTRIC COMPANY

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For the Respondent

Before: ROBERT J. BRISSENDEN
Administrative Law Judge

DECISION AND ORDER

This is a proceeding under the Energy and Reorganization Act of 1974, as amended, (hereinafter referred to as the "Act"), 42 U.S.C. § 5851, and its implementing regulations, 29 C.F.R. Part 24.

The Complainant Vera English filed a complaint with the United States Department of Labor, under 29 C.F.R. § 24.3, on August 24, 1984, and an amended complaint on August 27, 1984. Her Complaint alleged discrimination as a result of the initiation of and the participation in Nuclear Regulatory Commission (hereinafter NRC) investigations of facilities at the Respondent General Electric Company (hereinafter GE) plant located in Wilmington, North Carolina. On October 2. 1984, following an investigation, the Administrator of the Wage and Hour Division, Employment Standards Administration, Department of Labor, concluded that English had been discriminated against as defined and prohibited by the Act and 29 C.F.R. § 24.4. The decision of the said Administrator was appealed by both Complainant and the Respondent.

A formal hearing was held in Wilmington, North Carolina, from December 17 to December 19, 1984, and a second session of the hearing was held on March 19 to March 28, 1985, at which times the parties were afforded full opportunity to present evidence and argument. The findings and conclusions in this decision are based upon my observation of the witnesses who testified at both sessions of the hearing, upon an analysis of the entire record, arguments of the parties (both oral and written) applicable regulations, statutes, and case law precedent. By agreement of the parties, time constraints applicable to this case were waived.[1] On April 5, 1985, an Order was issued setting the court's time limits on the submission of briefs and proposed findings of fact, Fee and Cost Petition, and the response by GE to said petition. The Order also clearly indicated that the record, for the submission of

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evidentiary documents or any other documents, was closed. On June 27, 1985, because said order had been ignored, as was evidenced by numerous documents mailed in to the judge's San Francisco office, another Order was issued advising the parties that any documents submitted which were in contravention of the April 5, 1985, Order would not be considered. Accordingly, Respondent's Motion to Strike a Portion of Complainant's

Brief is granted and no documents or material submitted post-hearing is considered part of the evidentiary record.

Statement of the Case

Vera English was an employee of GE from November 13, 1972 to July 30, 1984. During the times relevant to this case, Mrs. English worked in the Chemet Laboratory.[2]

On March 5, 1984, Mrs. English was an hourly worker in said laboratory. At that time, she was working on the shift known as the "B" shift. In that particular week, she started working Sunday from 7:00 a.m. to 3:10 p.m. She worked the same hours on the fifth, sixth and seventh and eight of March. She then switched to a different shift, on Friday. This was her normal routine during that month. Her shift Friday evening, started at 11:00 p.m. and went on to 7:30 a.m., a shift commonly referred to as a "graveyard" shift. She had no immediate supervisor to bring complaints to until the following Sunday evening, when a William Lacewell came on duty. It was in the week prior to that Sunday, starting with Monday, March 5, 1984, that events occurred which had great bearing on her removal by management from the Chemet Lab and the eventual termination of her employment with GE.

The Chemet Lab included what were known as "controlled areas".[3] Mrs. English had made complaints to the NRC and to GE management in years prior to the March 1984 period of time, but the parties were limited to the time frame above-mentioned (see footnote 2, *supra*.). Mrs. English had contacted the NRC on August 29, 1982 and on February 13, 1984. Investigations into her allegations were conducted by the NRC on September 7 - 10, 1982, and March 26 - 29, 1984. The same February 13th allegations were brought to the attention of GE management in a written report by Complainant, dated February 21, 1984. An examination and investigation of conditions, upon which Mrs. English's complaints were based, was

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conducted by GE on March 8 - 21 and March 26 - 30, 1984, revealed that Assurance Review report, dated April 26, 1984, revealed that several of Mrs English's accusations of violations of company practice and procedure had substance. A prior GE Chemet Lab Safety Review report (dated March 29, 1984), concluded that safety procedures and conditions, in the lab were adequate. With reference to the same allegations, NRC concluded that they were unsubstantiated.

Claimant's work in the Chemet Lab consisted of quality control duties, in which samples of uranium powder are weighed, oxidized, weighed again, dissolved in nitric acid and finally weighed again. The analyst is then able to determine the concentration of uranium in a given sample to ascertain whether the proper "mix" has been accomplished. On Monday, March 5, 1984, Mrs. English was in the process of weighing a sample when she found contamination left by the prior shift. This occurred again in the following three

days. Mrs. English testified that the nature and amount of contamination required her to do considerable work to clean it up before she could start on her own work. She believed that the male workers, who worked the shift just prior to hers, were careless and sloppy in their work. She felt that they depended on her to clean up. According to Mrs. English, the contamination was quite visible to anyone. It was on her work surface and on a nearby microwave oven, a piece of equipment used by her and the workers on the prior shift. Additionally, she found uranyl liquid contamination (producing a yellow stain) on two legs of her work table. She cleaned all of this up for several days, then on Thursday or Friday, she again found new stains and contamination elsewhere. On this occasion, knowing that there was no supervisor present until Sunday, she stated that she put red tape around the stain on the table legs so that she would be able to point it out to her supervisor, Bill Lacewell. Her purpose was also to indicate the areas of contamination as a warning to fellow workers. She testified that she purposely left the contamination, outlined by red tape, so as to prove to management that her co-workers were extremely lax in their performance of clean-up duties. Some of her prior complaints, in her view, had received little attention since she was thought to have insufficient proof of malfeasance by other employees. She felt that this was because she always promptly cleaned up visible contamination, therefore she had nothing tangible to show management to back her accusations.

She recalled that the red tape and the contamination was still

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there on Saturday and Sunday. Sunday evening, the first night after Thursday, that a regular supervisor was on duty, the Complainant promptly discussed the matter with supervisor Lacewell. Mrs. English was firm in her contention that she had not deliberately contaminated any part of her work station, and that she had cleaned the contamination left by others. With the exception of the portion of contamination outlined by red tape, all had been cleaned. She admitted she intentionally left said contamination for the purposes heretofore mentioned. She stated that she, at that time, trusted Mr. Lacewell more than other management personnel. She had on numerous occasions brought up the problems of the defective microwave oven, the workers not using the "friskers" on leaving controlled areas, and the constant failure to clean up contamination at her work station, but management, according to her, did not show serious concern on these subjects. Mrs. English was of the opinion that management's main concern was keeping up production so that safety was sacrificed, and accordingly her superiors did not appreciate her pointing out unsafe practices of fellow workers. She strongly felt that such practices endangered her health and the health of others.

In her reporting on her concerns that Sunday evening, she pointed out the contaminated table legs outlined by red tape.[4] She advised Lacewell, at that time, that she did not intend to keep cleaning up for other people. She also related her concerns on what had occurred in the prior week, including the microwave defect that allowed leaks and fumes strong enough to give her a headache. She asked permission of Lacewell to use the "frisker"

(personal survey device) to check out certain areas of her work station. Lacewell granted this request.

To some extent, Lacewell, in his testimony corroborated Complainant's story with reference to the microwave oven, her mention of the red tape and expression of her concern over other employees' spillage. However, he denied that she pointed out the contamination surrounded by red tape, or seeing the red tape.

Subsequent to the above events there was a correction of the microwave defect, and an inspection and cleaning of the area by GE personnel. All of which necessitated work stoppage in the affected areas of the laboratory. Additionally, as a consequence of Mrs. English's March 1984 complaints (made to NRC and GE), a series of communications, both written aid oral, between management and

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Mrs. English began. Various meetings were held, some with Mrs. English present and some without her presence. Certain charges were set out in a letter dated March 15, 1984, which included:

1. the unauthorized removal of the personal survey instrument from the entrance to the laboratory;
2. the deliberate contamination of a table;
3. failure to clean up contamination, knowing it existed;
4. the continued distraction of other laboratory employees; and
5. disruption of normal laboratory activities.

Mrs. English appealed said charges, and during the company appeal process, it was finally determined that the "frisker" removal had been authorized. As to charges No. 2 and No. 3. GE's witnesses did not seem in total agreement as to whether said charges had merit or not. All but No. 3 were dropped or at least it was decided that no action would be taken in regard to same. Action was taken on the No. 3 infraction.

The punishment dealt to Mrs. English for "failure to clean up contamination, knowing it existed" was removal from the Chemet Lab and assignment to some rather menial work in the Building "J" Central Stores warehouse. Complainant testified that a man was assigned to watch her constantly and that she was humiliated in an incident concerning her shoes. At some time subsequent, Complainant was advised that she would have to "bid" for an open position, that she qualified for within the GE plant, provided that it was not one within the Chemet Lab. A time limit was set and, there apparently existing no such positions, she was involuntarily placed on a "lack of suitable work" status. There is nothing in the record to show that any "suitable" work position was ever offered to Complainant. Further, the record is devoid of any rebuttal evidence to Mrs. English's charge that she was the only person ever removed from the Chemet Lab for failure to clean up contamination. She was credible in her testimony that other workers had caused the contamination and there was no evidence to the contrary. Further, the evidence

clearly shows, without contradiction, that at least one shift and possibly two (not counting her shift) failed to clean

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up visible contamination. The area of contamination was outlined with red tape, whether such method was considered proper for dealing with the situation or not, the red tape added to the visibility of the contamination. Yet, no one using the same work table, in other shifts, bothered to report this nor to clean it up.

Testimony by GE management made it quite obvious that the sheer number of the complaints made by Mrs. English to NRC (and to management) brought about a cessation of work due to the GE's investigation and meetings and the concomitant NRC investigations. The latter investigations resulted in a rather mixed series of findings.[5]

The annoyance caused by Mrs. English's allegations, whether justified in management's eyes or not, coupled by the embarrassment and involvement of much of GE's management personnel with the NRC investigations, appears to have culminated around the March to May 1984 period, although NRC investigations continued during September, November and December of 1984 and January and March of 1985.

Mrs. English testified as to some rather bizarre series of break-ins into her home, corroborated in part by police testimony. Insufficient proof was presented to tie in GE employees.

Complainant called a psychologist, Dr. Peter Boyle, who testified that he was of the opinion that the actions of management, as related by Mrs. English to him, brought about a depressed and fearful emotional state. He reached this opinion after lengthy interviews and the administration of tests that included standard intelligence tests, multiphasic personality inventory and the Rohrschak ink blot test. He also reviewed her medical records and discussed with her the impact of the various actions taken against her by GE, during her final years of employment. He determined that Mrs. English was candid in her reports of her symptomology, and that she was neither paranoid nor suicidal. His diagnosis of her condition was that she was suffering from a severe adjustment reaction coupled with mixed emotional features, namely depression and "anger" (clinically termed "agitated depression"), all associated with stress resulting from her work situation. Specifically, her emotional problems are a cumulative effect of various stressful occurrences that Mrs. English experienced during her employment with Respondent. Dr. Boyle's prognosis was that the condition is treatable with supportive psychotherapy, including medication. He

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opined that Complainant should continue treatment once a week for at least six months. A Dr. Bill Knox, M.D., has been treating her on referral from Dr. Boyle.

Unfortunately, nothing was elicited on the cost of such treatment from Dr. Boyle.

Discussion of Issues

The ultimate issue in this case, is whether the Respondent discriminated against Vera English due to her engaging in "protected activities". Such activities, in the instant case, being the initiating of and cooperating with the investigations of NRC.

In order for a Complainant to prevail on a discrimination claim under the Energy Reorganization Act, 42 U.S.C. § 5851 (hereinafter ERA), the Complainant must prove that: (1) the party charged with discrimination is an employer subject to the Act; (2) that the complaining employee was discharged or otherwise discriminated against with respect to his compensation, terms, conditions or privileges of employment; and (3) that the alleged discrimination arose because the employee participated in an NRC proceeding. *DeFord v. Secretary of Labor*, 700 F.2d 281, 286 (6th Cir. 1983). Once the employee an illegal motive played some role in the discriminatory act(s), the burden shifts to the employer to prove that he would have discharged or taken whatever discriminatory action was proven, even if the protected activity did not occur. *Mackowiak v. University Nuclear Systems, Inc.*, 735 F.2d 1159 (9th Cir. 1984). See also *NLRB v. Transportation Management Corp.*, 103 S.Ct. 2469 (1983).

It was conceded that GE was an employer subject to the ERA. The banishment from the Chemet Lab and the subsequent discharge (for that is what it amounted to, regardless of the euphemism used by Respondent), clearly affected Mrs. English's terms, conditions and privileges of employment; and on her discharge date, the effect was total on her compensation.

The disciplinary actions of Mrs. English's employer coincided, in time, with her strongest worded complaints in March of 1985, and the meetings and communications, prior to the banishment from the laboratory, concerned the subject of her actions in attempting to correct what she considered violations of NRC requirements.

There is little doubt that this lady was a difficult employee to handle, that she disrupted work activity at times, and that some of the time her complaints had only minor merit. Nevertheless, it also appears true that many of her complaints had a proper basis in fact, and that her concern for her own safety and the safety of fellow employee was a strong factor in her allegations.

The gist of Respondent's chief defense to the substantive charges was that Mrs. English was a high strung, nervous woman with marked and emotional reactions to practices that

were not within her perfectionist's point of view. To bolster this defense theory, a somewhat selective chart of charges, made to the NRC and the NRC findings was presented by Respondent. The contention was that the majority of complaints resulted in findings of "no merit" or, at most, a minimal violation. A review of the NRC Findings does not indicate such an innocuous conclusion with reference to GE's record with the NRC. This "scorecard", however, has little to do with the central issue. Unique or important information is not required. The need to protect channels of information from being dried up by Employer intimidation is the purpose of the Act, not the disclosure of particular types of information, *DeFord v. Secretary of Labor, supra*. Nevertheless, Respondent would have a valid defense if it had proven sufficient justification for the disciplinary actions taken, *apart from Complainant's participation in protected activity*.

On the last day of the hearing Mrs. English became overwrought and indulged in an outburst which lasted several minutes, the subject of which was the frustration that she felt over her employer's refusal to give credence over her concerns on hazardous practices. From the defense point of view such an emotional response to cross-examination tended to support the contention that Complainant was an unusually excitable individual, therefore her disruption of the lab and its workers gave Employer reason to remove her. On the other hand, considering the unrefuted testimony of the psychologist, this behavior, at the end of a long trial, could reasonably be interpreted as symptomatic of the emotional state which had resulted from Employer's discriminatory actions.

Additionally, Respondent urges that the banishment from the Chemet Lab and the subsequent discharge was wholly justified by Mrs. English's serious infraction of the "failure to clean up visible contamination" rule. GE's management witnesses testified that they considered such actions as a means of entrapment of

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Radiation Safety inspectors for the company. Management felt a concern as to the lengths that Complainant would go to in promoting her views on safety practices, and therefore considered her a threat to other employees' safety. While this may be logical, if management's view of her personality is accepted, this expressed concern with safety is belied by Respondent's inertia in regard repeated violations of safety rules by other employees. One example of this being the failure to investigate why the uranyl stain was not cleaned up by any other party prior to the Monday following Complainant's report to Lacewell.

Employer's burden requires that it prove an affirmative defense, i.e., it has the burden of persuasion. *Mt. Healthy v. Doyle*., 429 U.S. 274, 97 S.Ct. 568, 50 L.Ed.2d 471. In dual motive cases, the employer bears the risk that the legal and illegal motives cannot be separated. An effort must be made to sort out these motives. The presence or absence of retaliatory motive is a legal conclusion and is provable by circumstantial evidence. *Mackowiak, supra*. at 1162 and 1164.

In the instant case, Respondent's witnesses were not believable in attributing the discipline imposed on: (1) regards for other employees safety which was ostensibly endangered by Mrs. English's actions and complaints and (2) for the "deliberate" violation of the clean-up rule. When the whole of the evidence is considered, there appears no adequate explanation as to why:

(a) no investigation was made concerning other employees, including management, failing to clean up visible contamination;

(b) such employees, if known (and logically, at least some *were* known) were not punished or admonished in any way; and

(c) the infraction of failure to use personal survey devices was so lightly regarded with reference to punishment vis a vis failure to clean up visible contamination.[6]

Additionally, the coincidence of a series of allegations by Mrs. English culminating in the March 1984 serious charges and various meetings directly connected with the March complaints with the banishment from the Chemet Lab is a factor that carries considerable weight. Further, the meetings, as testified through management's witnesses, came across as inquisitions to find charges that would "stick", not a true investigation into the validity of

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concerns over general laboratory safety. Mr. Lacewell was concerned about "entrapment" of Radiation Safety personnel and Mr. Sheely about "flagrant violation of work rules"; neither supervisor, as far as can be ascertained from the record, made any great effort to properly investigate Mrs. English's complaints on safety. The one rule that Mrs. English technically violated, it may therefore be inferred, was a pretext for getting rid of an employee who would not stop reporting violations to NRC. Notices at the plant and other information which Mrs. English understood as citing her duty to report violations, were apparently accepted by her at face value. Nothing in the record, briefs or in my research indicates that the number and frequency of reports of violations to NRC excuses discipline against the employee reporting. Indeed, all violations are to be reported along with the employer's failure to take adequate corrective action. Defense Motions to Dismiss and/or For Summary Judgment:

The motions are based on ERA sections 210(g) and 210(b).

The motion on timeliness was previously denied on November 1, 1984, with permission to bring it again after the close of the hearing.[7]

Section 210(g) of the ERA, 42 U.S.C.A. 5 5851(g) provides:

> Subsection (a) of this section shall not apply with respect to any employee who, acting without direction from his or her employer (or employer's agent), deliberately causes a violation of any requirement of this chapter or of the Atomic Energy Act of 1954, as amended (42 U.S.C.A. § 2011, *et seq*.)

There was no evidence introduced to indicate that the failure to clean up a spill of uranyl would constitute a violation of any portion of the Atomic Energy Act. However, such a failure to act was considered a violation by NRC, and therefore could be considered a "requirement" as called for in the above statute. Assuming that such is the case, I do not consider that Mrs. English deliberately caused a violation under the circumstances of this case. Respondent contends on one hand, that Mrs. English's only recourse with regard to discovered violations was to report them to management, which she did to no avail, or to the NRC. On the other hand, Respondent would have Mrs. English continue to abate violations

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caused by others--namely, to clean up contamination left by employees on prior shifts in violation of NRC requirements. GE cannot have it both ways. I find Mrs. English's statement credible that she had not caused the uranyl stain on her work table. Her outlining of the results of some other person's negligence and failure to clean up was in effect, at the same time, a notice to management and a warning to fellow workers of the visible contamination. Since Mrs. English had many times in the past cleaned up contamination caused by other persons in their preceding shifts, she was entitled to expect that someone other than she would clean up or call attention to the uranyl stain. Further, I found her credible in her testimony that she brought the stain and red tape to the attention of her immediate supervisor, Mr. Lacewell, as soon as he was available to observe the same first hand. Once the matter was brought to attention of management, an order should have issued to clean the stain. At least the Radiation Safety men should have been called in to view the situation. Mrs. English, as heretofore stated, knew that she could expect no credence to her complaints without tangible evidence. In demonstrating the malfeasance of others, she took the only means available to provide visible proof to support her past and immediate allegations. Her demonstration of same was used as a pretext for retaliatory action, and by way of Respondent's motion it is also used as a basis to defeat her claim. To allow the latter would be patently unfair and defeat the purpose of the Act. This was not an act done deliberately to invoke "whistle blower" protection, rather it was a means of reporting violations, albeit unorthodox. *See* S.Rep. No. 848, 95th Cong., 2d Sess. 30, *reprinted in* 1978 U.S. Code Cong. & Ad. News 7303, 7304; *Hochstadt v. Worcester Foundation For Experimental Biology*, 545 F.2d 222 (1st Cir. 1976).[8]

The motion based on section 210(g) is denied.

With respect to the defense motion under section 210(b), I find that Mrs. English's complaint was timely filed. Section 210(a) profides in pertinent part that "no employer . .

. may discharge any employee or otherwise discriminate against any employee with respect to his ... employment..." 42 U.S.C. § 5851(a). Section 210(b) provides that "any employee who believes that he has been discharged or otherwise discriminated against . . . may, within thirty days after such violation occurs, file . . . a complaint with the Secretary of Labor . . . alleging such discharge or discrimination." 42 U.S.C. § 5851(b).

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Mrs. English alleged in her complaint continuing acts of discrimination by GE, as a result of her protected activities, from December 15, 1983, culminating in her transfer out of the Chemet Lab on March 15, 1984, and her discharge on July 30, 1984. GE contends that the thirty-day statute of limitations began to run on May 15, 1984. By letter of that date, Mrs. English was notified that as a result of her intentional failure to clean up contamination she would not be allowed to return to work in controlled areas, that her temporary reassignment would be extended for ninety days beginning May 1, 1984, that open placement positions would be reviewed in an effort to find suitable work for her, and that, in the event that she failed to secure permanent placement by July 30, 1984, she would be "involuntarily placed on lack of suitable work" status. Mrs. English alleges that GE's purported effort to find suitable work for her was merely another pretext in its efforts to remove her from the company.

GE's reliance on the cases of *Chardon v. Fernandez*, 454 U.S. 6 (1981) and *Delaware State College v. Ricks*, 448 U.S. 250 (1980) is misplaced. Those cases involved racial discrimination in the denial of tenure. In each of these cases, the complainant was denied tenure and given a one-year "terminal" contract. The court held that the proper focus is on the time of the discriminatory act, not the point at which the consequences of the act become painful. *Ricks*, 449 U.S. ar 258; *Chardon*, 454 U.S. at 8. In said cases the fact of termination was not in itself an illegal act. Furthermore, neither complainant alleged any illegal acts subsequent to the dates on which the decisions to terminate were made. In the instant matter, the statute specifies that discharge is one event upon which a complaint may be predicated, and is thus an illegal act in itself. Additionally, Mrs English has established a continuing violation; "a series of related acts, one or more of which falls within the limitations period." *Valentino v. U.S. Postal Service*, 674 F.2d 56, 65 (D.C. Cir. 1982).

Mrs. English, therefore, did not need to file shortly after the first of the discriminatory acts, nor at any time prior to the discharge. If this were not so, an Employer could easily circumvent the statute by minor acts of discipline, followed by a discharge timed beyond the requisite time limit.

GE's motion, on both grounds, is denied.

Based on the foregoing discussion and the ruling on the

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motion, I make the following findings:

1. GE was an employer subject to the ERA (Act).

2. The Respondent employer discriminated against Complainant, by:

(a) banishing her from the Chemet Lab, and
(b) discharge from employment with GE

3. Said discrimination was motivated by Complainant's initiation of and participation in NRC proceedings investigating Employer's facility, specifically the Chemet Laboratory.

4. Respondent did not carry its burden to prove that the above discriminatory acts would have taken place, even if the protected activity of this Complainant had not taken place; i.e., the charge of "failure to clean up visible contamination" was a pretext.

5. Complainant, through her testimony and that of her witnesses (including psychologist Boyle) adequately established causal connection and the basis for compensatory damages and other relief provided by section 5851 of the Act.

6. The evidence of record considered for No. 5 finding sufficed without the necessity of evidence by an economist.

It is concluded that Complainant established a case of discrimination against Respondent, and in that regard the decision of the Administrator of the Wage and Hour Division is affirmed. With reference to the relief to be afforded, I have followed the guidelines of *DeFord, supra*. Accordingly, I must order the reinstatement of Ms. English's *former position* since that is what the statute, as interpreted by the *DeFord* court, clearly sets forth. The balance, of the relief provided, also has been kept strictly to the bounds of the remedies outlined in the statute. *DeFord, supra*., at page 289.

Attorneys' Fees and Costs

The express statutory provision for Complainant's attorney fees is as follows in the ERA:

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> If an order is issued under this paragraph, the Secretary, at the request of the complainant shall assess against the person against whom the order is issued a sum equal to the aggregate amount of all costs and expenses (including attorneys' and expert witness fees) reasonably incurred, as determined by the Secretary, by

> the complainant for, or in connection with, the bringing of the complaint upon which the order is issued. 42 U.S.C. § 5851(b)(2)(B).

Complainant's attorneys have filed petition for fees and costs along with numerous supporting documents. The total of attorneys' fees and expenses claimed is $543,660.95. Respondent filed a Memorandum in opposition to said petition.

The determination on whether the items listed were "reasonably incurred" requires a logical starting point. Two cases, frequently cited in attorney fee matters, have been used to provide the outline for this subject.

In the *Lindy Brothers Builders, Inc. v. American Radiator & Standard Sanitary Corp.*, 487 F.2d 161 (3rd Cir. 1973) the "lodestar" approach was set forth. Under this analysis the number of hours spent and the manner that they were spent is first considered; next the reasonable hourly rate is fixed, considering the attorney's reputation and status (contingency aspects and quality max, increase or decrease the "lodestar", which is the figure for hours times hourly rate). In *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974), a race discrimination case, twelve factors were recited:

> (1) the time and labor required; (2) the novelty and difficulty of the questions involved; (3) the skill necessary to perform the legal services properly; (4) the preclusion of other employment by the attorney due to the acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) the time limitations imposed by the client or circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation and ability of the attorney; (10) the undesirability of the case; (11) the nature and length of the professional relations with the client; and (12) awards in similar cases.

Counsel for Respondent, in his memorandum suggested categories for the items of work to facilitate determining whether the hours were reasonably spent. I have kept this in mind. In *Copeland v. Marshall*, 641 F.2d 880, the court was upheld on the use of the "lodestar" approach, with a reduction of hours which were nonproductive. In deciding which hours to reduce (and in some instances, the eliminating of total hours for certain items), I have carefully reviewed the *New York Gaslight Club v. Carey*, 100 S.Ct. 2024 (1980) and the later *Webb v. Board of Education of Dyer County*, 105 S.Ct. 1923 (1985). I consider the latter case as more pertinent to the case at hand. I incorporate by reference the reasoning of the *Webb* case in the following discussion.

As stated by the Sixth Circuit court in *DeFord, supra*., a section 5851(a) case is a simple one requiring the complainant to prove three elements (see page 8 of this decision). This case was not one that required hearings on interlocutory rulings of this administrative law judge in the U.S. District Court for D.C. or in the Court of Appeals for the D.C. Circuit. Such hours are deleted from consideration. Time spent in challenging the NRC determinations was eliminated. Those items which lack specificity were not

considered. It was not important that NRC find merit in each of Mrs. English's complaints, nor was the mode of NRC investigation material to this case (see Discussion, this Decision). The words "legal research" are assumed to relate to the subjects listed for the same date. I had the choice of eliminating all such references for being non-specific or making the above assumption; where there appears no reason to research the subject of a date in question, the "research hours" will be eliminated. It is regrettable the Complainant's attorneys spent so much time in re-arguing their case-in-chief in the documents for the attorney fee request without devoting short specific explanation of matters researched, subjects of conferences and telephone calls, and subjects discussed with witnesses.

Mr. Ratner's hours will be discussed first. His hours are reduced by 1773 hours. Drastic reductions were made due to the non-specific quality of many items, the work on unrelated matters, excessive "legal research" and the plethora of conference hours. I allowed reasonable air travel time because the case necessitated travel from Mr. Ratner's office to Wilmington, N.C. I do not find merit to the argument that local counsel could have handled the case since GE is the largest single employer in Wilmington, and finding a local attorney would naturally be difficult.

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Respondent's attorneys were also from out of town. Reduction was further made on the basis that much of the time spent was for items of work that were clerical and administrative in nature. Further, as Respondent suggests, the excessive hours per day are just not credible, considering the consecutive days claiming over 16 hours per day.

Mr. Ratner's experience and background, while impressive, does not convince this judge that it is worth $185.00 per hour for this type of case. On the one hand, Mr. Ratner argues that he should receive credit for all hours on research because the field of law involving "whistle blower" cases was unfamiliar to him, but at the same time he expects the same fee as for his acknowledged field of expertise. The "lodestar" figure here would be 185. times the hours left, 341, totalling $63,085.00. I have taken into account, however, the factors set forth in *Johnson, supra*. and the guidelines of *Lindy supra*. I found the most helpful were the factors for adjustment of the lodestar figure discussed in the *Lindy* case: (1) complexity and novelty of issues; (2) quality of work observed by the judge; (3) amount of recovery. As was stated above, in the discussion of *DeFord*, the case is a simple one with three basic elements to prove. Actually, in this case, the only element of the three requiring more than minimal evidence was the connection between the discriminatory acts and the "protected activity". This could have been accomplished in far less time by the testimony of the Complainant, witness Malpass and one or two management witnesses. Witness Mossman was needed on rebuttal of the points made by the defense and the psychologist expert was needed to establish a portion of proof of damages. This court repeatedly admonished counsel to limit adversary hostilities and to avoid excessive direct examination and cross-examination. Additionally, far too, much time was wasted on arguing minor points of evidence as well as service of subpoenas on

unnecessary witnesses. The quality of Mr. Ratner's trial work observed by this judge would be rated as below average for the most part. Associate counsel Schiller elicited far more pertinent information in his examination in consideraby less time than Mr. Ratner took for establishment of minor points. The time spent in producing material that was newsworthy for newspapers and television, may have been needed, as Mr. Ratner put it, to force GE into a position to settle the case, but it had no place during court-room hours.

The amount recovered, when the value of the back pay and fringe benefits are considered along with compensatory damages, was

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adequate in this case. The contingency factor is a plus for Complainant's attorney, but a minor one considering the facts of the case.

I find that total trial time for the Complainant's case, including rebuttal evidence should have taken three and one-half days. Time for the defense could not be controlled by Complainant's counsel, though cross-examination could have been reduced. Accordingly, I reduce the hourly rate to $100.00 due to consideration of the three *Lindy* adjustment factors. Total fee allotted to Mr. Ratner: $34,100.00.

Following the same format as in the reduction of Mr. Ratner's requested hours, I reduce Mr. Schiller's hours by 456.75, so that his total allowable hours total 366.75. The "lodestar" for Schiller, using the hourly rate requested would equal a total fee of $45,843.75. However, in considering that Mr. Ratner was the lead attorney, along with the three factors of *Lindy*, I reduce the hourly rate to $90.00. I found Mr. Schiller more effective than Mr. Ratner in examination of witnesses, less of a disruptive element in court, but much of his work duplicated that of Mr. Ratner's and his talents were wasted in clerical or administrative work. His total fee is therefore adjusted to $33,007.50.

I find that the use of any other attorneys was unnecessary considering that *two* attorneys handled the defense of this case in excellent fashion. In many ways, considering the adverse finding by the Department of Labor administrator and the fact situation, the defense case was the more difficult to present. I therefore eliminate Mr. Nagle's fees entirely.

I also eliminate the cost of Ms. Jo G. Wilson's fees and expenses, as representing the ordinary costs of running a law office. Two paralegals were not needed. Ms. Zubrin's paralegal hours, through no fault of her's, nevertheless involved much research that had no materiality to this case. Some of her research pertained to proper subjects and her work in the courtroom saved time for the court as well as attorneys. Such work was needed specifically for this case. However, a good deal of Ms. Zubrin's work could be classified as straight secretarial, and I have deducted accordingly. I allow 60 hours representing the total allotted, for Ms. Zubrin's services after deductions, or ,200.00.

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Mr. Jeannett's hours appear to be those of a legal secretary, and nothing is allowed for his time. (See *Hensley v. Echerhart*, 461 U.S. 424, 103 S.Ct. 1933 (1983).

With reference to costs and expenses, I find that expert witnesses Mossman and Boyle were necessary but Respondent's counsel makes a valid point in stating that the hours for witness Mossman were excessive in view of 15 minutes of testimony. Even considering that the expert assisted Mr. Ratner in devising relevant questions of Respondent's witnesses, I find that much of Mr. Mossman's time was unnecessary for this case. All of the time allotted, during brief testimony, to setting out Mr. Mossman's standards vis a vis NRC's or those of GE appear barely relevant. Keeping in mind that an extra trip was necessitated due to unforeseen changes in scheduling of witnesses and that possibly eight hours were spent waiting to be called on the first day that his testimony was expected, I will allow a total of ,850.00 to include this witness' fees and expenses.

The other items of "expense" and costs are outrageous with reference to Mr. Ratner. Expenses listed for Mrs. English are not of the type allowable under the statute and regulations, therefore none are allowed. Expenses for Mr. Schiller, though also excessive, appear much more in line. I will allow the costs of reasonable photocopying, some subpoena service charges and other normal costs plus a reasonable amount towards airfare and hotel charges for the two attorneys and Ms. Zubrin, taking into account that I consider the length of the trial as unreasonable, and much of the overhead expense as relating to immaterial matters. The total allowable for reasonable costs and expenses is $2,850.00 (additional to attorney, paralegal and Professor Mossman's expense). This includes Dr. Boyle's time, in court only. Anything over and above that amount, I find to be unnecessary due to the excessive trial time used, the immaterial motions, the proceedings in other courts and the excessive document production. No other items, whether termed fees, expenses or costs are allowed, though all documents on fees, expenses and costs have been considered.

ORDER

1. Respondent General Electric Company is to take affirmative steps to cease discriminatory acts against Complainant.

2. Complainant is to be reinstated to her former position

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together with compensation for any back pay loss calculated from the time of the last pay period plus interest at a rate per annum equivalent to the coupon yield of the average accepted auction price of the last 52-week U.S. Treasury bills. Such interest shall be payable from the date of Complainant's cessation of employment to the date that such

back pay is actually paid. Any rate increase since the cessation of employment is to be calculated into the back pay compensation.

3. Complainant is to be reinstated as to terms, conditions and privileges of her employment so as to make her whole for any such losses suffered by cessation of employment.

4. Respondent is entitled to set off any contributions owed to savings plans formerly participated in by Complainant, if such employee contributions ceased during her time off employment, and in order to bring Complainant up to date on any such plan.

5. Compensatory damages are awarded, and are intended to cover past and future medical expenses (not already covered under any employee Health and Accident plan which is to be fully reinstated pursuant to order No. 3 above) and as recompense for the humiliation and mental suffering of the Complainant due to Respondent's discriminatory acts. Said compensatory award is $70,000.00.

6. Respondent is to pay Complainant's attorneys fees and expenses, as follows:

(a) A fee for legal services to Mozart Ratner, Esq. of $34,100.00.
(b) A fee for legal services to Arthur W. Schiller, Esq. of $33,007.50.
(c) A fee for para-legal services of ,200.00
(d) Expert witness fees and expenses for Professor Mossman of ,850.00.
(e) All other costs and expenses not covered above, including Dr. Boyle's courtroom appearance fee, in the amount of $2,850.00

The aggregate amount of the above costs and expenses allowed

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to Complainant is $73,007.50.

ROBERT J. BRISSENDEN
Administrative Law Judge

Dated: AUG 1 1985
San Francisco, CA

RJB:scm

[ENDNOTES]

[1] Shortly after the first session of the hearing, the parties had waived the time constraints of 29 C.F.R. § 24.6, because of the necessity of having the hearings continued into a second session. Additionally, in order to allow time for the submission of posthearing

briefs, the parties have agreed to waived the requirements of 29 C.F.R. § 24.6(a) and 24.6(b).

[2] Many of the allegations and contentions of both parties were too far removed in time to have any significant relevance to this case. Accordingly, although Mrs. English worked in the Chemet Lab for twelve years, other than for taking cognizance of Complainant being an experienced laboratory worker, under the provisions of 29 C.F.R. § 24.5(e)(1), the time frame was limited by this judge to 1982 to 1984.

[3] The Chemet Lab is a part of a large building within the GE facility in Wilmington, North Carolina. There are various laboratories within the Chemet Lab.

The plant is involved in the production of fuel bundles of uranium material, and said "bundles" are intended for use at reactor sites for the production of electric power. Additionally, uranium powder is produced, primarily for sale to overseas customers. The Chemet Lab had areas calling for certain precautions, i.e., controlled areas, Persons leaving a controlled area must use a monitor or frisker, which is a hand held unit used to check for radiation contamination on any part of the body, including hands, feet, face and clothing. Another precaution taken, within the lab, are hoods with fans to pull off airborne contamination away from an individual who is working under that hood. Within the controlled or "semi-controlled" areas the lab workers must wear gloves, a lab coat and safety glasses. These workers work both with powder and liquid solutions of uranium. There are marble tables with marble legs for use by the lab workers. The marble material is not affected by vibrations and is easier to clean than other material. Safety rules require that any spillage of uranium powder or uranium liquid be brushed or cleaned off from time to time during the work hours, and especially before leaving the work shift.

[4] There was a dispute by management as to the use of red tape to designate a "hot" area. Some of the documents that Claimant relied on were ambiguous and confusing with reference to the use of red tape. Management claimed that red tape was to designate areas of *storage* of uranium products rather than to designate areas where spills had occurred.

[5] The severity level of violations for an NRC licensee, such as the GE Company, are graded from one to five. The larger the number, the less severe the violation. Severity levels I and II involve very significant violations; level III violations are significant; level IV violations are significant if left uncorrected; and level V violations are of minor concern.

Following the above discussed allegations, which were reported to and investigated by both GE and the NRC, Mrs. English filed additional allegations with the NRC in May and June of 1984. The latter complaints were not reported to GE, though GE learned of them through NRC investigations. A number of the May and June allegations were merely reiterations of the previously filed complaints. Of the 35 allegations investigated, five were found to be Severity level IV violations; one (failure of personnel to use personal survey devices) was determined to be a corrected prior violation; seven were partially or wholly substantiated, but were not deemed violations of NRC regulations or

license requirements; one was unresolved; and two were not addressed. Three level IV violations and one level V violation were found to exist on the basis of independent NRC determinations. (See ALJ Exhibits 5-12, incl.; Employer's Exh. 11)

[6] Even taking into account the level V vs. level IV NRC designations, a five day suspension appears to have been the heaviest punishment dealt to anyone.

[7] Said Ruling and Order is incorporated herein by reference.

[8] In determining whether Claimant's conduct afforded an independent, nondiscriminatory basis for discharge, or whether it was protected activity, the court must determine whether Claimant's overall conduct was so generally inimical to Employer's interests and so excessive as to be beyond the protection of the statue. The court must balance the setting in which the activity arises and the interests and motivations of both Employer and Employee. *Hockstadt, ibid*. at pages 229, 230 and 232.